



Whistleblowing Developments in The Netherlands

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Report line Whistleblowers, april 2000
(in Dutch: Meldlijn Klokkenuiders)

Organized by the Trade Union Confederation
FNV

‘de klok luiden’ = ring the bell (literally translated) or
blow the whistle

Protective legislation for civil servants
(public sector)

National agreement of social partners
about dealing with suspected malpractices
in companies (private sector):

[http://www.stvda.nl/en/~media/Files/Stvda/Talen/Engels/2012/
20120829_EN.ashx](http://www.stvda.nl/en/~media/Files/Stvda/Talen/Engels/2012/20120829_EN.ashx)

Legislation (Ambtenarenwet = Civil Service Act):

- National and local governments have to adopt a procedure for dealing with suspected malpractices
- Civil servants, reporting suspected malpractices in good faith and in accordance with the procedure, shall not suffer negative consequences as a result of their reporting
- When civil servants are not satisfied with the way the competent authority has dealt with their report, the malpractices can be reported to the OIO (Public Integrity Board)

Statement of the Labour Foundation

http://www.stvda.nl/en/~media/Files/Stvda/Talen/Engels/2012/20120829_EN.ashx

- Basic principle: any whistleblower acting in good faith deserves the company's protection. An employee can be said to be acting in good faith if he or she acts with due care in both the formal (procedural) and substantive sense
- The statement contains basic components of a reporting Procedure, based on the requirements of acting with due care as well as an example procedure
- In whistleblowing cases judges evaluate the behaviour of employer and whistleblower to these requirements



Requirements of acting with due care

The whistleblower has acted with due care in a formal sense when (s)he:

- has first reported the relevant facts internally, if necessary up to the highest level, unless this cannot be reasonably expected of him or her or is contrary to the public interest;
- has made the facts known externally, in an appropriate manner commensurate with the situation, provided that internal reporting is not required or does not lead to corrective action.

The whistleblower has acted with due care in a material sense when (s)he:

- has reasonable grounds for suspecting that the relevant facts are correct;
- reporting the malpractice (internally or otherwise) is or could be in the public interest;
- the public interest served by reporting the suspected malpractice externally takes precedence over the employer's interest in maintaining confidentiality.



Other elements of the Statement, referred to in case law

A good employee can be expected to first report suspected malpractice internally. Sometimes (s)he can reasonably not, for example

- if there is an acute threat involving a serious and urgent public interest;
- if the employee has good reason to fear reprisals;
- if there is a clear risk that evidence will be concealed or destroyed;
- if a prior internal report hasn't led to the desired effect;
- if the employee is obliged or empowered by law to report externally.

Consulting an expert in confidence is in itself not a violation of the duty of confidentiality.

An employee has in general the right to express his opinion (freedom of expression), also in front of his employer, and to report any malpractice, especially when a public interest is at stake.



Case law Dutch courts & ECHR

Criteria applied by Dutch courts and ECHR are essentially the same (*Guja v. Moldova*, *Heinisch v. Germany*). [Employment perspective and Human Rights perspective – Robert Vaughn]

Compared to the Dutch lower courts, the European Court imposes less stringent requirements on the gravity of the public interest. It may be expected that the lower courts will be less severe towards whistleblowers as a result of the relatively new European case law and a recent similar approach of the Dutch Supreme Court.



Assessment of the ECHM

(The application of Article 10 of the Convention to the workplace)

Criteria:

- The public interest in the disclosed information
- Whether the applicant had alternative channels for making the disclosure
- The authenticity of the disclosed information
- Whether the applicant acted in good faith
- The detriment to the employer
- The severity of the sanction



Recent developments

- Advice Centre for Whistleblowers
- Bill House for Whistleblowers
- Pubbleaks



Advice Centre for Whistleblowers

- Established on 1 October 2014
- Supported by Labour Foundation and Council for Public Sector Personnel Policy
- Task: advice and support whistleblowers in the public, semi-public and private sectors on the actions they can take to raise their concerns about wrongdoing without suffering any negative effects
- Annual Report 2013: Courage when it counts
(<http://www.adviespuntklokkenluiders.nl/docs/default-source/default-document-library/advice-centre-for-whistleblowers-in-the-netherlands---annual-report-2013.pdf?sfvrsn=6>)



House for Whistleblowers (bill)

- Put forward by seven political parties
- Power to investigate both the wrongdoing and the retaliation (if any), leading to
- Recommendations for the employer
- Protection against dismissal and retaliation
- Obligation to establish whistleblowing procedures



Recommendation Council of Europe

Shortcomings of the bill:

- violations of human rights not explicitly included
- voluntary workers not included
- no obligation for small organisations to put in place a whistleblower procedure
- protection against retaliation only guaranteed if the whistleblower reports to the employer/ the House
- notification has to be made in good faith



Publeaks.nl

- Launched on 9 December 2013 by the Publeaks Foundation and a large number of Dutch media outlets
- Website for people to leak documents to the media securely and anonymously
- Designed to protect whistleblowers, shed light on wrongdoings and encourage and support investigative journalism
- Based on the GlobaLeaks software package developed by the Hermes Center for Transparency and Digital Human Rights.